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In The

Supreme Court of the United States

October Term, 1972

No. 72-243

CLEAN AIR COORDINATING COMMITTEE,

Petitioner,

vs.

SOUTH ADAMS FUEL COMPANY,
CHICAGO COAL MERCHANTS ASSOCIATION,
ILLINOIS POLLUTION CONTROL BOARD,

Respondents.

REPLY MEMORANDUM OF PETITIONER

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The brief of Respondent coal interests raises a multitude of arguments for the first time in the certiorari proceedings including Supreme Court Rule 19 reasons for certiorari not raised by petitioner, the assertion that only one question is involved, the claim that there is no federal jurisdiction because no federal question is supposed-

ly involved, and the issue of the noninvolvement of the Illinois Pollution Control Board ("State Board") and the Federal Administrator of the Environmental Protection Agency ("Federal Administrator").

Said respondents assert that the only question in the case is that of a private party using the "express authorization" exception to the federal anti-injunction statute. There are three questions, one involving the application of the "express authorization" exception but not involving standing of a private party to use that exception for no case law opposes such use, a second involving the "superior federal interest" exception to the anti-injunction statute and a third involving private party standing to use the "superior federal interest" exception. The questions themselves do not give a sufficient indication of the importance of granting certiorari.

Respondent begins its legal argument by making it appear that petitioner is relying for certiorari on reasons of conflicts between circuits, conflicts with state law and conflicts with decisions of this Court. Petitioner in its first brief did not rely on these conflicts as a reason for certiorari and respondent has raised them as straw men it could try to knock down. Petitioner requested certiorari because an important federal question involving the interpretation of a new federal law needed resolution by this Court for that question was not only important to this case but would reoccur throughout the country as implementation plans are constantly formulated under the Clean Air Act and because the decision below delays the application of federal regulations designed to stop presently occurring harm to human health, and affects state imput to such plans.

Because said respondents raised the question of conflicts between circuits, petitioner feels it must bring to the Court's attention three such conflicts. First, the Seventh Circuit holds that there can be state court review of the state suggestions for a federal regulation which were made under the terms of the federal Clean Air Act. That state proposal was part of a unitary process by which the Federal Administrator causes an implementation plan to become a federal regulation in force in a state and review of this process by statute can only occur in the United States Court of Appeals within thirty days after final action by the Federal Administrator. 42 U.S.C. §1857h-5(b)(1). The ninth circuit holds that when Congress designates a forum for judicial review of administrative action, such forum is *exclusive,* and that result does not depend on the word "exclusive" being in the statute providing for said forum. *UMC Industries* v. *Seaborg,* 439 F. 2d 953 at 955 (9th Cir. 1971).

Secondly, the Second Circuit in *Studebaker* v. *Gittlin,* 360 F. 2d 692 (1966) and the Fifth Circuit in *Tampa Phosphate* v. *Seabord Coast Line,* 418 F. 2d 387 at 392-4 (1969) held that private parties such as petitioner have standing to use the "superior federal interest" exception to the federal anti-injunction statute for public purposes in circumstances in which standing was denied by the Seventh Circuit in this case. Respondents have attempted to give those cases and others narrower meaning than they have, although petitioner admits that the use of the "superior federal interest" exception by a private party is highly limited, but in a way to permit use by petitioners in this case.

Thirdly, the Seventh Circuit decision is in conflict with portions of the Third Circuit's yet unreported decision of *Getty Oil* v. *Ruckelshaus* (No. 72-1419) which is the only other circuit decision dealing with the amended Clean Air Act. In that case Delaware proposed implementation plan provisions that were identical for a state regulation and also for transmittal to the Federal Administrator for his action as required under the Clean Air Act. The plant was adopted as a state regulation and was approved by the Federal Administrator as a federal regulation for Delaware. The court pointed out that Getty Oil could have appealed the state regulation to the state court and the federal regulation to the United States Court of Appeals within the limited time provided by 42 U.S.C. §1857h-5(b)(1). Getty instead filed a request for a variance from the state regulation with the state administrative agency, which if granted would have had to have federal approval because of federal preemption of minimum implementation plan standards. When the state did not proceed with granting Getty a variance, Getty obtained a preliminary injunction in state court against the enforcement of the state regulation, and when federal enforcement of the federal regulation (which was identical to the state regulation) was threatened, Getty attempted to obtain a temporary restraining order in federal district court against such enforcement. The Third Circuit held that the only review of the federal implementation plan process was exclusively in the United States Court of Appeals within thirty days of the Federal Administrator's final action on the plan. The Third Circuit went on to say at page 12 of the opinion that "Getty attempts to end run around the (Clean Air) Act

by seeking pre-enforcement judicial review before WARC (the state administrative agency) has had an opportunity to pass upon Getty's application for a variance, and before the (Federal) Administrator has had an opportunity to review any forthcoming state action." The Seventh Circuit has permitted such an "end run" as prohibited by the Third Circuit by permitting a state court to preempt the Federal Administrator's consideration of state suggestions for a federal regulation by enjoining the state from formalizing portions of the suggested plan that the state was to submit to the Federal Administrator under the terms of the Clean Air Act. The state court preemption of the Federal Administrator's considerations is contra to the above referred to provisions of the Clean Air Act which state that the Federal Administrator's considerations are only subject to limitations through judicial review in the United States Court of Appeals within a limited period after he has acted.

Respondent coal interests repeatedly raise the issue of the lack of involvement in this case by the State Board and the Federal Administrator. The coal interests predict in their brief that the State Board will not participate knowing that they have taken steps to prevent such participation. While assuring this Court that this is supposedly a state court matter, said respondents have told the state appellate court that it should not interfere with the injunction against the State Board "until a determination can be obtained from the United States Supreme Court" in this case. The State Board, to prevent itself from being whipsawed between the two cases by the tactics of the respondent coal interests, is not participating in this case. This has nothing to do with the

merits. In the trial court the State Board stated its intention to dismiss as a defendant and intervene as a plaintiff with the petitioner, but minutes later the judge stayed all proceedings. That stated intention is significant. The Federal Administrator is in an awkward position being forced to suggest substitute regulations because the state court injunction halted the State Board's formal transmittal. Respondent coal interests have refused to participate in federal hearings on the Federal Administrator's suggestions. However, this case should not revolve around respondents extra record innuendoes regarding the interest of other governmental entities and petitioner's forced extra record explanations. What is important is the questions and issues raised and these should be revolved on their own merits as they were resolved in a similar situation in *Studebaker* v. *Gittlin*, 360 F. 2d 692 (2nd Cir. 1966) where a private party enforced the Security and Exchange Commission regulations without that Commission or any other governmental entity being a party.

Respondent coal interests next raise the issue of federal jurisdiction, which was not reached by the appellate court. They claim that there is no jurisdiction under 28 USC §1331 because the case involves no federal question, but supposedly only deals with questions of state law. They neglect to make it clear that the state court proceeding has two effects, enjoining passage of a state regulation and at the same time, enjoining transmittal of finalized state recommendations for the Federal Administrator which is a part of the development of federal regulations for Illinois. If the state suggestions to the Federal Administrator meet federal statutory criteria, they

become federal regulations. (42 USC §1857c-5[a][2]). State regulations must meet the minimum standards set by the federal regulations (42 USC §1857d-1) and if state enforcement of the state regulations does not occur, the Federal Administrator enforces the federal regulations. (42 USC §1857c-8[a][1]). It should be obvious that what a federal official can enforce is a federal regulation, not a state regulation. The *Getty Oil* case, discussed above, makes the federal aspects clear. This action was only to enjoin interference with the federal aspects. The fact that the Federal Administrator is now considering its own implementation plan sections because the state court enjoined state imput does not change the fact of state imput rights and requirements under federal law and does not isolate what the state court did as a state law question. Where the act of a state court enjoining state officials from registering voters also interfered with the 1965 Federal Voting Rights Act, a federal question was involved. *United States* v. *Louisiana*, 265 F. Supp. 703 (E.D. La. 1966). A state court injunction of a state authority which interfered with a federal housing program involved a federal question. *United States* v. *Barrett*, 442 F. 2d 642 (4th Cir. 1971). Local acts affecting federal regulatory plans cause federal questions to arise. *Wickard* v. *Filbourn*, 317 U.S. 111 at 119-124 (1942) and *White* v. *United States*, 399 F. 2d 813 at 824 (8th Cir. 1968). If a state official was called to a congressional hearing to testify regarding what should be a federal regulation in his state, a federal matter is certainly involved and in this case which is similar, a federal matter is certainly involved supporting federal question jurisdiction.

Said respondents also claim that there is no federal jurisdiction under petitioner's alternative jurisdictional ground, 28 U.S.C. 1337. They admit that the Clean Air Act was passed by Congress in the valid exercise of its commerce power. *United States* v. *Bishop Processing*, 287 F. Supp. 624 at 629 (D. Md. 1969). But said respondents claim a private party cannot assert that jurisdictional ground. The law is contrary. Under that section a district court has jurisdiction over any civil action arising out of any act of congressionally regulated commerce without attempting a limitation with regard to actions brought by individuals. *Lyons* v. *Atlantic Coast Line*, 224 F. Supp. 1014 at 1016-17 (W.D. S. C. 1964) and cases cited therein.

Respectfully submitted,

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